*Due service and receipt of a copy of the within is hereby admitted*

*this..... day of January, 1911.*

.....

*Attorneys for Respondents.*

# In the Supreme Court

OF THE

# United States



OCTOBER TERM, 1943

**No. 636**

JAMES W. BUTLER, MARY L. BUTLER, MARY SEQUIN, CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J. LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH, ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE LEONARD, STEPHEN C. PERRY, CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WALTER WAFER, GEORGE W. IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORSEBERG, and MADGE MCNAUL, *Respondents,*

vs.

GRACE APPLETON MCKEY, *Petitioner.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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## Subject Index

## Table of Authorities Cited

### Cases



### Miscellaneous

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**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

## I.

**PETITIONER'S RELIANCE ON CALIFORNIA DECISIONS EXAMINING AFFIDAVITS FOR PUBLICATION OF SERVICE UPON "DIRECT ATTACK ON APPEAL" IS INCONSISTENT WITH HER CONTENTION BELOW THAT THIS JUDGMENT IS A NULLITY AND WITH THE FACT THAT NOT EVEN IN HER PRESENT PETITION DOES SHE IMPEACH THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE GROUND THAT THE COURT ERRED IN APPLYING THE RULES APPLICABLE TO "COLLATERAL ATTACK".**

Petitioner's motion to set aside the judgment entered by the clerk of the United States District Court on April 18, 1939, was filed more than three years after such entry of judgment, to wit, on July 23, 1942. At this time petitioner had no statutory remedy against the judgment, her motion could therefore succeed only if the judgment was void for lack of jurisdiction and could therefore be disregarded as a nullity by the court on its own motion.

*Washko v. Stewart,* 44 Cal. App. (2d) 311;
*Smith v. Jones,* 174 Cal. 513;
*City of Salinas v. Lee,* 217 Cal. 252.

In answer to respondents' argument that petitioner's motion was made after the time allowed for impeaching errors of the court, petitioner made it clear that she would stand or fall upon her contention that the judgment was void and could be disregarded by the court on its own motion. Petitioner stated her theory in the Circuit Court of Appeals as follows:

> "An adequate answer to appellants' argument is that the judgment being a void one, the court had power to set it aside on its own motion, without any intervention by appellee." (Appellee's brief in the Circuit Court of Appeals on page 3.)

In her brief to this court petitioner claims that her attack on the judgment should be treated more favorably than "a true collateral attack, being made by one not a party to the judgment and in another action" (first paragraph on page 23 of petitioner's brief).

Since petitioner, on account of the time element involved, must necessarily rely on her claim that the judgment was a nullity, she cannot at the same time contend that rules other than those applicable to a "true" collateral attack should be applied to her attack on the judgment.

The Circuit Court of Appeals has cited the recent case of *City of Salinas v. Lee,* supra, as California authority that a motion to set aside a judgment made after expiration of the time for direct appeal can be successful only if the judgment is void and subject to collateral attack, but that the discretion of the trial court will remain undisturbed. This doctrine (although not always recognized in earlier California cases) has consistently been followed in California since *People v. Norris,* 144 Cal. 422, 424. The development of the California law on this doctrine is summed up in 15 California Jurisprudence 47, Section 139, which summary of the law was cited with approval by the California Supreme Court in the *Salinas* case at page 256.

This doctrine of the California law is in harmony with the principle expressed by this court in *Matton S. B. Co. v. Murphy,* 319 U.S. 412, 415, and reiterated in this term by Mr. Chief Justice Stone in his dissent in *Hill v. Hawes,* 88 L. ed. Adv. Ops. 213, 216, to the effect that it is in the public interest, and it is the very purpose of limiting the period for appeal, to set a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellants' demands.

Apart from the fact that petitioner's reliance on California decisions involving direct attack on a judgment is inconsistent with her own theory, she is precluded from raising this point because she cannot in a petition for writ of certiorari seek review on points which were not urged by her in the Circuit Court of Appeals; and she cannot in her brief rely on decisions covering points which are not properly presented in the petition.

*Sonzinsky v. United States,* 300 U.S. 506;
*Helis v. Ward,* 308 U.S. 365, 370;
*Dickinson Industrial Site v. Cowan,* 309 U.S. 382, 389.

## II.

### THE JUDGMENT IS NOT VOID AND SUBJECT TO COLLATERAL ATTACK UNDER CALIFORNIA LAW REGARDLESS OF THE HEARSAY FEATURES IN THE AFFIDAVIT FOR PUBLICATION OF SERVICE.

The Circuit Court of Appeals for the Ninth Circuit has correctly held in this case that the hearsay nature of facts stated in an affidavit for publication of service may be considered by the judge in drawing his conclusion as to due diligence, and that under California law such a hearsay affidavit does not automatically make the judgment void against collateral attack. The court based this holding entirely on California precedent. Since the Appellate Court's decision is in itself high authority on California law, we do not anticipate that the Appellate Court's ruling on California law will be disturbed. Nevertheless, we will answer petitioner's arguments as follows:

Petitioner claims that the California cases of *Kahn v. Matthai,* 115 Cal. 689; *In re Behymer,* 130 Cal. App. 200; *Columbia Screw Co. v. Warner Lock Co.,* 138 Cal. 445, are contrary to the holding of the Court of Appeals. Each of these decisions was cited by the Court of Appeals which held that two of these cases, to wit: *Kahn v. Matthai,* supra, and *Columbia Screw Co. v. Warner Lock Co.,* supra, were concerned with a review of a judgment on "direct appeal" and that, therefore, the examination of the trial court's discretion in passing on affidavits for the publication of summons in those cases does not furnish a precedent as to the question of whether a judgment based upon a hearsay affidavit for publication of summons is void

upon "collateral attack". The petitioner makes much of the fact that the Appellate Court in the original wording of its opinion had said that the *Columbia Screw* case was "perhaps" contrary to the principle, applicable on collateral attack, that the hearsay nature of an affidavit does not affect the judgment based thereon, but that upon petition for rehearing the opinion was amended, so as to eliminate the word "perhaps". No weight can be accorded to this change in the wording of the opinion, because the Appellate Court clearly states that the California cases support the conclusion that a hearsay affidavit which may be held fatally defective on "direct appeal", will not render the judgment void on "collateral attack". The California Supreme Court in *Rue v. Quinn*, 137 Cal. 651, a case involving a collateral attack, clearly distinguished on this very ground, the earlier case of *Kahn v. Matthai*. The same distinction appears in the *Columbia Screw* case which was decided shortly after *Rue v. Quinn*. But the *Kahn* case and the *Columbia Screw* case are distinguishable from each other in that in the latter case the affidavit was not only a hearsay affidavit, but did not even contain an affirmation by the affiant that he believed the information obtained to be true. This lack of expression of the affiant's belief as to the truth of the information left it open whether he had other information contrary to that which was stated in this affidavit, so that the affidavit could not be considered one based on information and belief. This feature of the affidavit in the *Columbia Screw* case makes it one *sui generis*.

Since the *Kahn* case and the *Columbia Screw* case do not support petitioner's contention as to the nullity of the judgment, there remains only the case of *In re Behymer,* supra, where one of California's District Courts of Appeal cited and followed the decision of the Supreme Court of the State in the case of *Kahn v. Matthai,* supra, without noticing that said case according to *Rue v. Quinn,* supra, was authority only on "direct attack". The fact that the District Court of Appeal in the *Behymer* case relies solely on *Kahn v. Matthai* without even referring to the *later* Supreme Court case of *Rue v. Quinn,* deprives the *Behymer* case of any weight as authority as was recognized by the Circuit Court of Appeals in its decision.

The Circuit Court of Appeals in its citation of California cases refers to the early case of *Forbes v. Hyde,* 31 Cal. 342, wherein a marked distinction was drawn between an affidavit clearly of a character too unsatisfactory to justify an order for publication of summons based upon it and therefore subject to a direct attack on the judgment, and an affidavit which presents no evidence at all tending to prove the essential fact which might render the judgment void upon collateral attack. In fact, the rule in this case is identical with the doctrine approved by the United States Supreme Court in *Thompson v. Thompson,* 226 U.S. 551, to the effect that the material facts must be stated in the affidavit, but that defects in the mode of stating them or as to the degree of proof will not render the judgment void on collateral attack.

In *Rue v. Quinn,* supra, the court had before it as in the instant case a motion which was not made until

after the time for an appeal from the judgment had expired, and on this fact the court based its holding that it would not examine defects in the affidavit for publication of summons in the same manner as it did in the case of *Kahn v. Matthai,* supra. It is, therefore, a misleading citation from the *Rue* case in petitioner's brief in support of her petition at the bottom of page 17, where a sentence from the court's decision is printed from which it is made to appear that the court held that a motion to set aside the judgment made at such time was a direct attack. We refer to the court's statement at page 656 of the official California Reports which we have quoted on page 37 of our opening brief in the Court of Appeals, from which it clearly appears that a motion such as this made after the expiration of the time allowed for appeal was treated by the court according to the rules governing a collateral attack.

In *Ligare v. California R. R. Co.,* 76 Cal. 610, the same distinction between the examination of an affidavit on "direct" and "collateral attack" was drawn by the court. The affidavit was held sufficient on collateral attack. That the attack in that case was a "true" collateral attack is immaterial because a motion to vacate the judgment made after the statutory time is governed by the same rules as a collateral attack. In appellants' opening brief in the Appellate Court on page 36 a passage from page 612 of the *Ligare* case was cited from which passage it may be noted that the affidavit upheld in the *Ligare* case was very similar to the affidavit in the instant case in that the affiant stated that he had made inquiry of all per-

sons from whom he could expect to obtain information as to the residence of said defendant and that the affiant likewise stated that he had placed a summons and alias summons in the hands of various sheriffs with instructions to make service, but that said summonses had been returned to him because the sheriffs had not been able to effect service thereof. The main weakness of the affidavit in the *Ligare* case was that the affiant had omitted to state that upon his inquiries as to the residence of the defendant he had received no information placing him in a position to find the defendant within the state. This weakness of the Ligare affidavit is not matched by any defect of the present affidavit, wherein the same affirmation was made as to the inquiries made by the affiant and his associates but wherein it was also expressly stated as a fact within affiant's knowledge that neither he nor his associates knew the present whereabouts of said defendant and could not learn her present whereabouts. Consequently, even if all statements of facts which were made on hearsay are disregarded, the present affidavit is still more complete than the affidavit which was upheld in the *Ligare* case to which the Court of Appeals has compared it because of the similarity of both affidavits in certain respects.

In the case of *City of Salinas v. Lee*, supra, the affidavit involved was not the affidavit for publication of service, but the affidavit of publication wherein it was erroneously stated that summons had been published for one month instead of the two-month period required by law. Both of these affidavits are required by law and petitioner's insinuation on page 23 of

her brief in support of the petition that only the affidavit for publication is part of the judgment roll is erroneous; see page 254 of the *Salinas* case where the court states that the affidavit of publication "of course, constitutes a part of the judgment roll". In that recent California Supreme Court decision it is said that even a misstatement of material facts in an affidavit for publication of service does not make the judgment void on "collateral" attack. The California Supreme Court discussed the question of what defects appearing in the judgment roll make a judgment void on its face. The court states that under California law every presumption is in favor of the validity of the judgment, and consequently accords weight to the jurisdictional recital in the judgment which constitutes part of the judgment roll. In the instant case, as stated by the Circuit Court of Appeals, the judgment contained the recital that the defendant Grace Appleton McKey had "been duly and regularly served with summons", and the order of publication of summons which is also part of the judgment roll recited diligent search for said defendant, and that after due diligence she could not be found within the State of California and that she had been and was concealing herself to avoid the service of summons. According to the *Salinas* case (page 256), a "collateral" attack on the judgment in order to defeat such jurisdictional recitals must affirmatively show that such recitals were solely based upon the deficient affidavit and that at the time of the entry of the judgment it did not appear to the court from other sources that due service had been had. In other

words, absolute verity must be accorded to the jurisdictional recitals even if documents which are part of the judgment roll are defective unless it has been shown affirmatively that the recitals were solely based on faulty statements in such documents.

The rules of California law heretofore discussed were restated in the case of *Kaufmann v. California Mining Syndicate* (1940), 16 Cal. (2d) 90, where the court, citing *Rue v. Quinn* and other cases, reiterated the distinction as to the examination of affidavits upon "direct" and "collateral" attack and on page 92 stated that the authorities cited by the appellants in that case did not support their position, because such authorities involved direct attacks rather than collateral attacks upon judgments. In defining what makes a judgment void on its face the court stated that the trial court's findings as to the validity of the service of process are binding if it does not *affirmatively* appear that these findings were based solely upon any particular document or documents relating to service of summons. Where such exclusive reliance on a particular document does not appear as a matter of record "the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of summons" (page 93).

It will be noted from these decisions that petitioner is in error in assuming that a judgment under California law is void on its face and an absolute nullity where a defect in the proof required for publication

of service is apparent from an examination of any document constituting part of the judgment roll (see page 9 of the petition and page 23 of the brief and support thereof).

Since the California law relating to the limitations of a collateral attack on a judgment is settled, there is no need for any discussion of two factors referred to in the decision of the Circuit Court of Appeals, to wit: that the affidavit for publication in the instant case contained a statement which was not based on hearsay, but on the affiant's own knowledge and was entirely sufficient to support the court's findings, and that the affidavit likewise referred to the return of the United States Marshal consisting of a certification by three deputy marshals that on a certain day, different in each case, each of them received the summons and that after diligent search he was unable to find the defendant Grace Appleton McKey. The cases holding that the marshal's or sheriff's certificate is admissible evidence for an order of publication of service are collected on pages 22 et seq. of our reply brief in the Circuit Court of Appeals.

We are unable to ascertain whether petitioner in this court urges the point on which she sought to obtain a rehearing in the Appellate Court, namely that the affiant had stated on information and belief the uncontested fact that defendant had not filed a certificate of residence as provided for in Section 1163 of the Civil Code of California in the City and County of San Francisco. This point is not raised in the petition and reference to it is made only in the state-

ment of facts on page 15 of the brief in support of the petition. Since this reference is insufficient to impeach the judgment as to this point, we only refer as a matter of precaution to the argument contained on pages 13 et seq. of our reply brief to the petition for a rehearing in the Circuit Court of Appeals.

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## III.

**THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED ON THE ALTERNATIVE GROUND THAT UNDER FEDERAL PRECEDENT THE FEDERAL JUDGMENT INVOLVED IN THIS CASE IS NOT VOID AND SUBJECT TO COLLATERAL ATTACK. THIS GROUND FOR THE DECISION IS NOT ATTACKED BY THE PETITIONER.**

The federal law contains no provision on publication of service in a case like this and, therefore, the California law is applicable as to the manner how service by publication can be made. However, the question of whether this judgment of a United States District Court is void because of defects in the service of summons effected under California law, is within the province of the federal law.

*Bronson v. Schulten,* 104 U.S. 410;
*United States v. Mayer,* 235 U.S. 55.

The Circuit Court of Appeals has, therefore, first examined whether the affidavit for publication of summons was sufficient to effect service so that the court acquired jurisdiction under California law. Since the court held that the service was sufficient to establish the court's jurisdiction under California law, the decision could have been based on this sole

ground. The court, however, based its decision also on the alternative ground, as did the United States Supreme Court in *Thompson v. Thompson,* supra, that even a defect in the mode of service fatal under local law would not have made the judgment a nullity under federal law.

*Thompson v. Thompson,* 226 U.S. 551, 556;
*Pennoyer v. Neff,* 95 U.S. 714;
*Marx v. Ebner,* 180 U.S. 314;
*Cohen v. Portland Lodge No. 142,* 9 Cir., 152 Fed. 357.

Nowhere does the petition seek review of this alternative ground for the Circuit Court of Appeals' decision which, therefore, is not within the scope of the review sought from this court. Since the alternative ground is sufficient to support the decision of the Circuit Court of Appeals, petitioner's attack on the court's holding on California law is futile, because petitioner could not succeed even if her contentions on the California law relating to service by publication were correct.

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## CONCLUSION.

We respectfully submit that the Circuit Court of Appeals was correct in holding that hearsay features contained in an affidavit for publication of service do not render a judgment void and subject to collateral attack under California law, and that even if such affidavit were fatally defective under local law a federal judgment based on publication of service would

not be a nullity because of defects in the mode of proof upon which the trial court based its finding of due service.

Dated, San Francisco, California,
February 16, 1944.

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